Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	))	WC Docket No. 02-112

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

The National Association of State Utility Consumer Advocates ("NASUCA")[1] hereby submits these comments in response to the *Notice of Proposed Rulemaking* ("*Notice*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[2] The Commission seeks comment on how it should implement Section 272(f)(1) of the Telecommunications Act of 1996,[3] which requires sunset of nearly all the structural separation and nondiscrimination safeguards placed on the provision of interLATA toll services provided by a Bell Operating Company ("BOC") three years after the BOC has obtained § 271 approval to provide in-region interLATA service. The Commission presents five alternatives for comment.[4]

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[1] NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

[2] FCC 02-148, adopted May 16, 2002. A synopsis of the *Notice* was published in the Federal Register on June 21, 2002. See 67 Fed. Reg. 42211.

[3] Pub. L. No. 104-104, 110 Stat. 56, § 272(f)(1), codified at 47 U.S.C. § 272(f)(1).

[4] *Notice*, ¶¶ 17-26.

NASUCA urges the Commission to extend by rule the structural separation and nondiscrimination safeguards contained in § 272. BOCs still are local exchange monopolists in most areas, especially regarding residential service. BOCs retain substantial market power, and have the ability and the incentive to discriminate against their interexchange competitors. It is far too early to lift the safeguards.

I. THE BOCS' MARKET POWER DEMONSTRATES A CLEAR NEED FOR CONTINUATION OF THE § 272 SAFEGUARDS.

In implementing § 272, the Commission placed certain restrictions on the provision of interLATA services by BOCs who have obtained § 271 approval. These restrictions include:

- The BOC and its § 272 affiliate may not jointly own transmission and switching equipment;[5]
- The BOC may not perform operating, installation or maintenance functions for its § 272 affiliate's facilities, and the affiliates may not perform these functions for the BOC's facilities;[6]
- The § 272 affiliate must maintain separate books of account and have separate officers and directors;[7]
- The § 272 affiliate may not obtain credit using the BOCs' assets;[8] and
- Transactions between the BOC and the § 272 affiliate must be at arm's length and must be reduced to writing, with a detailed description of the transaction posted on the Internet.[9]

These safeguards are based on the Commission's finding in the *Non-Accounting Safeguards Order* that the BOCs have market power in the provision of local exchange

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[5] 47 C.F.R. § 53.203(a)(1).

[6] 47 C.F.R. § 53.203(a)(2) and (a)(3).

[7] 47 C.F.R. § 53.203(b) and (c).

[8] 47 C.F.R. § 53.203(d).

[9] 47 C.F.R. § 53.203(e).

and exchange access services in their service areas.[10] The *Notice* described the Commission's finding:

> The Commission stated that as long as the BOCs retain market power in the provision of these services, they will have an incentive and ability to discriminate against their long distance competitors, and engage in other anti-competitive conduct. In particular, the Commission found the BOCs to be dominant carriers with an incentive to discriminate in providing exchange access services and facilities that their interexchange competitors need to compete in the interLATA telecommunications services markets. For example, the Commission noted that BOCs may have an incentive to degrade services and facilities furnished to their interexchange competitors. Additionally, the Commission noted that a BOC could attempt to charge competitors prices for inputs that are higher than the prices charged to the BOC's section 272 affiliate, thereby creating a price squeeze.[11]

That picture has changed little in the past six years. The Commission's latest report on local competition clearly shows that incumbent local exchange carriers ("ILECs"), including BOCs, still have monopoly power in the local exchange market.[12] Among the findings in the Report:

- Competitive local exchange carriers ("CLECs") control 10% of end-user switched access lines; thus ILECs still control 90% of end-user switched access lines nationwide.[13]

- CLECs own 30.9% of their lines, a decrease of 2.5% from June 2001.[14] Thus, only about 3% of end-user switched access lines are provided over non-ILEC facilities, and therefore ILECs own 97% of end-user switched access lines.

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[10] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21911-12, ¶ 10 (1996).

[11] *Notice*, ¶ 3 (citing 11 FCC Rcd at 21911-13, ¶¶ 10-12).

[12] "Local Telephone Competition: Status as of December 31, 2001," Industry Analysis Division, Common Carrier Bureau (July 2002) ("Report"). Except for some revenue data, the Report does not differentiate between BOCs and non-BOC ILECs.

[13] *Id.*, Table 1.

[14] *Id.*, Table 3.

- ILECs control 93.4% of residential and small business end-user switched access lines.[15]
- ILECs control at least 84% of end-user switched access lines in 49 states, the District of Columbia, Puerto Rico and the Virgin Islands.[16]

By any reasonable definition, the BOCs are still monopolists. Unfortunately, the situation is likely to worsen, due to the shaky financial situation of many CLECs that bundle local and long distance packages. If their CLEC were to go out of business, the first – and possibly only – choice for many customers would be their BOC. For example, after the WorldCom collapse, SBC in Missouri noted a 25% increase in calls from customers who were seeking to switch providers.[17]

Clearly, the BOCs still have market power and thus still have the ability to discriminate against competitors. The incentive to discriminate is also present, since BOCs that have received § 271 approval are eager to increase their long distance market shares. SBC, for example, has placed a "strong emphasis on bundling long distance with local calling services and features."[18] As a result, SBC's winback rate in the five SBC Southwestern Bell states – where the company offers bundled local and long distance service – is 50%, approximately double SBC's winback rate in its other regions.[19] Competition would be harmed if the safeguards were allowed to sunset now.

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[15] *Id.*, Table 2. Combined, ILECs and CLECs control 143,378,706 switched access lines, while CLECs alone control only 9,489,049.

[16] See *id.*, Table 6.

[17] See "Duke gets bargain, Savvis residuals from WorldCom," St. Louis Business Journal, July 5, 2002 print edition (www.bizjournals.com/industries/high_tech/telecom/2002/07/08/stlouis_story6.html, accessed July 11, 2002).

[18] See SBC First Quarter 2002 Investor Briefing (April 18, 2002) at 7.

[19] See SBC Second Quarter 2002 Investor Briefing (July 23, 2002) at 6-7.

On the other hand, retaining the § 272 safeguards would not impede BOCs' ability to compete. The BOCs who have gained § 271 in-region interLATA approval have had little difficulty in competing, even with the safeguards. Verizon is now the nation's fourth largest long distance carrier with nine million customers, having experienced a 51% increase in subscribership since the second quarter of 2001.[20] More than 45% of Verizon's long distance customers are in the Verizon region.[21] The company has 2.5 million customers in New York, 830,000 in Massachusetts and 710,000 in Pennsylvania.[22] Thus, Verizon has obtained approximately 18% of the New York long distance market in two and one half years,[23] 18% of the Massachusetts long distance market in just over a year[24] and 8% of the Pennsylvania long distance market in about nine months.[25]

Similarly, SBC has been able to capture a significant share of the long distance market in the six states in which it is authorized to provide interLATA service. The

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[20] See Verizon Investor Quarterly, Second Quarter 2002 (July 31, 2002) at 3.

[21] *Id.* at 5.

[22] *Id.*

[23] New York has approximately 13,576,870 access lines. See Competition Report, Table 6. Verizon received § 271 approval for New York in December 1999. See *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, adopted December 21, 1999.

[24] Massachusetts has approximately 4,600,678 access lines. See Competition Report, Table 6. Verizon received § 271 approval for Massachusetts in April 2001. See *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, adopted April 16, 2001.

[25] Pennsylvania has approximately 8,710,969 access lines. See Competition Report, Table 6. Verizon received § 271 approval for Pennsylvania in September 2001. See *In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Memorandum Opinion and Order, adopted September 19, 2001.

company has 5.6 million long distance customers, or about 29% of the 19 million access lines in the six states.[26] SBC's long distance subscribership has increased by 33% in one year.[27]

The § 272 structural separations would be even more necessary if a BOC were allowed to acquire the assets of WorldCom, as suggested by Chairman Powell.[28] A BOC's acquisition of the second-largest long distance company in the United States would provide the BOC with additional ability and incentive to affect competition.

It would be premature for the Commission to allow the § 272 safeguards to sunset. In order to allow competition to flourish, the Commission should retain the safeguards.

II. THE COMMISSION SHOULD EXTEND THE § 272 SAFEGUARDS BY RULE AND SHOULD LIFT THE SAFEGUARDS ON A STATE-BY-STATE BASIS ONLY UPON A SHOWING THAT THE BOC IS NO LONGER THE DOMINANT LOCAL EXCHANGE CARRIER IN ITS SERVICE TERRITORY IN THE STATE.

The Commission has presented five options for implementing § 272(f)(1):

1. Allowing all provisions of § 272 to sunset, without a substitute adopted by rule.
2. Extending the statutory requirements by rule for a defined period.
3. Adopting less stringent separation requirements.
4. Allowing the separate affiliate requirements to sunset, but retaining the nondiscrimination and/or biennial audit provisions.

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[26] See SBC Second Quarter 2002 Investor Briefing (July 23, 2002) at 6.

[27] *Id.*

[28] See "Telecom Crisis Forces FCC Shift: Could Let a Bell Buy WorldCom," Wall Street Journal (July 15, 2002) at A1.

5. Adopting nonstructural safeguards, such as reporting requirements.[29]

As discussed in the previous section, the safeguards found in § 272 are still needed. Thus, allowing the provisions to sunset without a substitute adopted by rule is not in the public interest.

Additionally, adopting the less stringent separate affiliate requirements of the *Competitive Carrier Fifth Report and Order*,[30] as suggested by the Commission,[31] would not sufficiently deter BOCs from using their market power to the detriment of competitors. The *Competitive Carrier Fifth Report and Order* contains three requirements: the affiliate must maintain separate books and records; it cannot jointly own transmission or switching facilities with the LEC; and it must acquire services from affiliated LECs at tariffed rates, terms and conditions.[32]

This set of requirements is missing at least three key elements contained in the § 272 safeguards. One, the affiliate would be allowed to use BOC assets to obtain financing. Thus, the BOC could use assets from its monopoly local exchange service – paid for by captive ratepayers – to finance its competitive long distance affiliate. This is not only unfair to the BOC's local exchange ratepayers, it also would put competitors at a distinct disadvantage. Two, the BOC and its affiliate could have the same officers and directors. Thus, the affiliate's decision-makers would be privy to considerable knowledge of its competitors' business plans. Three, the BOC would be able to perform

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[29] *Notice*, ¶ 17.

[30] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof,* CC Docket No. 79-252, *Competitive Carrier Fifth Report and Order,* 98 FCC 2d 1191 (1984).

[31] *Notice*, ¶ 23.

[32] *Id.*, ¶ 23, n. 30.

operating, installation and maintenance functions for the affiliate. Once again, many services paid for by the BOC's captive local exchange ratepayers could be used to help the affiliate compete against other long distance companies. Using the less stringent safeguards contained in the *Competitive Carrier Fifth Report and Order* is not in the public interest.

Similarly, retaining only the nondiscrimination and biennial audit provisions of § 272, or instituting reporting requirements, would be inadequate to protect consumers and competitors from BOC anticompetitive practices. Without the structural separation requirements, neither would prevent the cross-subsidization problems identified above.

Therefore, the Commission should extend the safeguards by rule. However, extending the § 272 safeguards for a defined period may not address the problem that the safeguards were intended to tackle – the BOC's local exchange bottleneck allows it to discriminate against long distance competitors. Thus, the separate affiliate safeguards placed on a BOC should be lifted only upon a showing that the BOC cannot engage in such discrimination. This would require analysis of the BOC's market power on a state-by-state basis. The safeguards should remain in place until the BOC can show that it is no longer the dominant local exchange carrier in its service territory in the state in question. Even then, continuation of some restrictions – such as the prohibition on obtaining credit using the BOC's assets – would be appropriate.

III. CONCLUSION

The Commission should extend the § 272 safeguards by rule, as discussed above. The public interest demands that, in order to promote competition, BOCs and their long distance affiliates continue to be structurally separate and that BOCs do not discriminate against competitors of their long distance affiliates.

Respectfully submitted,

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August 5, 2002